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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/562,384

12/27/2005

Norio Ishibashi

CU-4616 RJS

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LADAS & PARRY LLP
224 SOUTH MICHIGAN AVENUE
SUITE 1600
CHICAGO, IL 60604

EXAMINER

KRAUSE, ANDREW E

ART UNIT

PAPER NUMBER

1794

MAIL DATE

DELIVERY MODE

06/18/2009

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No. 10/562,384	Applicant(s) ISHIBASHI ET AL.	
	Examiner ANDREW KRAUSE	Art Unit 1794	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☐ Responsive to communication(s) filed on ____.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 7-12 is/are pending in the application.
- 4a) Of the above claim(s) 9-11 is/are withdrawn from consideration.
- 5) ☐ Claim(s) ____ is/are allowed.
- 6) ☒ Claim(s) 7, 8 and 12 is/are rejected.
- 7) ☐ Claim(s) ____ is/are objected to.
- 8) ☐ Claim(s) ____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on ____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. ____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. ____. |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date ____. | 6) <input type="checkbox"/> Other: ____. |

DETAILED ACTION

Response to Amendment

Applicants reply to the previous office action has overcome the previously set forth objections to the abstract and claims. The amendment to claim 7 has also overcome the previously set forth rejection under 35 USC 112.

Claim Rejections - 35 USC § 112

1. The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

2. Claim 12 is rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention. There does not appear to be support in the specification for the new limitation 'positioned in the vicinity of the upper end of the container and is not directly in contact with the frozen culture stored in the container'. Further, applicant points to paragraphs 80-82 for support; however, the present specification provides only 70 paragraphs.

3. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

4. Claims 7-8,12 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.
5. Claim 7 recites the limitation 'type'. It is unclear what is conferred by the term, extending the scope of the expression so as to render it indefinite.
6. In claim 12, it is unclear in what location a vent port needs to be located in order to be considered to be within the 'vicinity' of the upper end of the container, rendering the scope of the claim indefinite.

Claim Rejections - 35 USC § 103

7. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

8. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.

3. Resolving the level of ordinary skill in the pertinent art.
 4. Considering objective evidence present in the application indicating obviousness or nonobviousness.
9. Claims 7-8, 12 rejected under 35 U.S.C. 103(a) as being unpatentable over Mincher (Derwent Abstract of ZA 8307853) in view of Wyberg (US 4,792,048), Sellers (US 3,946,780) and "Signs and Technology of Lactic Acid Bacterium", hereafter 'Lactic Acid Bacterium'.
10. Mincher discloses a gable topped container which is provided with a vent port for allowing gas from the product stored with to escape (Basic Abstract).
11. Mincher fails to explicitly disclose the material construction of the container (column 16, lines 37-42).
12. However, Wyberg discloses a material for gable top containers comprising an aluminum film layer bonded to paperboard. It would have been obvious to one having ordinary skill in the art at the time of the invention to use such a material in construction the gable top container of Mincher as such a material is commonly commercially available and known to be suitable for producing gable top containers (Wyberg column 16, lines 37-42).
13. Mincher and Wyberg fail to disclose that the vent port is covered by an air permeable filter material made from an unwoven paper having microbial

impermeability and air permeability of a range of 5 to 10000 sec/100 cc under the Gurley method, and formed at least in a portion of the container.

14. However, Sellers discloses a packaging body comprising a vent port for allowing gas to escape covered with an air permeable filter material (Tyvek 1073B as used in [0032] of the US PGPUB of the instant application), made from an unwoven paper having microbial impermeability and air permeability of a range of 2 to 120 seconds under the Gurley method.

15. It would have been obvious to one having ordinary skill in the art at the time of the invention to modify the packaging body disclosed by Mincher and Wyberg with the addition of a filter over the vent port as disclosed by Sellers, because the vent port with a filter used by Sellers allows for gasses to escape the container (the same purpose as the vent port of Mincher), but prevents bacteria from entering the container (column 2, lines 39-41), therefore preventing contamination of the contents.

Mincher, Wyberg and Sellers fail to disclose that the contents of the container are frozen pellets of bifidobacteria. However, 'Lactic Acid Bacterium' discloses that frozen pellets of bifidobacteria are commonly packed into similar paper based containers (paragraph 2). It would have been obvious for one having ordinary skill in the art at the time of the invention to use container disclosed by Mincher, Wyberg and Sellers to store a frozen

culture of pelleted Bifidobacteria as disclosed by 'Lactic Acid Bacteria', because the containers provide a convenient storage means ('Lactic Acid Bacteria' paragraph 2).

14. Regarding claim 12, Mincher discloses that the vent ports are located in upper portion of the roof (paragraph 2), which is considered to be in the vicinity of the upper end of the container. It would be obvious to one having ordinary skill in the packaging art that the frozen culture would not be directly in contact with the vent port, as gable top containers are not filled in a manner which contacts the contents with the roof portion.

Response to Arguments

15. Applicant's arguments with respect to pending claims have been considered but are moot in view of the new ground(s) of rejection.

16. Regarding the argument that the container disclosed in Sellers is used for a different purpose than the present invention, a recitation of the intended use of the claimed invention must result in a structural difference between the claimed invention and the prior art in order to patentably distinguish the claimed invention from the prior art. If the prior art structure is capable of performing the intended use, then it meets the claim.

Conclusion

17. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to ANDREW KRAUSE whose telephone number is (571)270-7094. The examiner can normally be reached on 7:30-5.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks can be reached on (571)272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/ANDREW KRAUSE/
Examiner, Art Unit 1794

/KEITH D. HENDRICKS/
Supervisory Patent Examiner, Art Unit 1794